NO. 21311

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

2252
V-3492

UNITED STATES OF AMERICA

Appellee and Petitioner,

vs.

CORNELIUS LOCKHART,

Appellant and Respondent.

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PETITION FOR REHEARING

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TO THE HONORABLE JUDGES: BROWNING AND ELY OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND FOLEY OF THE DISTRICT OF NEVADA, SITTING BY DESIGNATION.

Pursuant to Rule 35 of this Court, appellee, United States of America, respectfully petitions this Court for rehearing in the above-captioned cause, and suggests a rehearing en banc. This suggestion for a rehearing en banc is made with the approval of the Solicitor General of the United States.

The opinion and decision of this Court was filed on October 23, 1968, and this petition is filed within the time provided therefor by provision of the Court's Rule 40.

BY ALLOWING A REGISTRANT TO ATTACK HIS CLASSIFICATION DESPITE THE FACT THAT HE HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES, THIS COURT HAS IGNORED AN UNBROKEN LINE OF ITS DECISIONS AND CREATED A SERIOUS THREAT TO THE SELECTIVE SERVICE SYSTEM.

The District Court in this case refused to consider Lockhart's defense that the denial by the local board of his claim for classification as a conscientious objector was without any basis in fact on the ground that all of appellant's contentions were foreclosed by his failure to exhaust his administrative remedies [P. 2 Slip Opinion].

This Court, in reversing the District Court, held: "The failure to exhaust administrative appellate remedies is not always a bar to asserting as a defense to criminal prosecution, for refusal to submit to induction, that there was no basis in fact for the denial of a claimed conscientious objector classification." [P. 3, Slip Opinion].

The Government respectfully submits that this Court, in reversing the District Court, overlooked an unbroken line of decisions of this Court holding that exhaustion of administrative remedies is a prerequisite to judicial review of an administrative order.

This rule, as stated most recently by this Court in Yeater v. United States, ___F. 2d ___(9th Cir. June 27, 1968), is:

> "Appellant did not appeal any of his I-A (available for military service) classifications through the appellate review channels of the

Selective Service System. He is therefore precluded from claiming as a defense to a criminal prosecution that there was no basis in fact for the classification."

Accord, Edwards v. United States, 395 F. 2d 453 (9th Cir. 1968), petition for cert. filed 37 U.S. L.W. 3049 (U.S. July 30, 1968);

Woo v. United States, 350 F. 2d 992 (9th Cir. 1965);

Greiff v. United States, 348 F. 2d 914 (9th Cir. 1965);

Badger v. United States, 322 F. 2d 902 (9th Cir. 1963), cert. denied 376 U.S. 914 (1964);

Moore v. United States, 302 F. 2d 929 (9th Cir. 1962);

Prohoff v. United States, 259 F. 2d 694 (9th Cir. 1958), cert. denied 359 U.S. 907 (1959);

Evans v. United States, 252 F. 2d 509 (9th Cir. 1958);

Frank v. United States, 236 F. 2d 39 (9th Cir. 1956);

Kaline v. United States, 235 F. 2d 54 (9th Cir. 1956);

Skinner v. United States, 215 F. 2d 767 (9th Cir. 1954), cert. denied 348 U. S. 981 (1955);

Rowland v. United States, 207 F. 2d 621 (9th Cir. 1953);

Williams v. United States, 203 F. 2d 85 (9th Cir. 1953), cert. denied 345 U. S. 1003 (1953).

In support of their view that the Lockhart case presented "exceptional circumstances" which called for a relaxation of the rule, the majority relies upon Donato v. United States, 302 F. 2d 469, 470 (9th Cir. 1962), cert. denied 374 U. S. 828 (1963) and Wills v. United States, 384 F. 2d 943 (9th Cir. 1967), cert. denied ___ U. S. ___ (1968).

In Donato the registrant testified that he had every intention of appealing within the prescribed period, but that his failure to do so was due to the fact that he had been summoned to firefighting duty and that when he returned from his firefighting mission the appeal period had expired. In reversing and remanding this case, this Circuit held that in the particular circumstances of this case, a relaxation of the exhaustion of remedies rule would be just and proper.

In the Wills case the local board had declared Wills a delinquent and had thereafter proceeded to reclassify him to class I-A. However, contrary to a specific requirement of the Selective Service Regulations, the local draft board did not mail Wills his

notice of delinquency until long after the expiration of the ten day period for appeal from his subsequent reclassification. This Circuit, in holding that Wills was not precluded from attacking his classification because of a failure to appeal, decided that Wills could not justly be held to the consequences of his failure to appeal, since during the appeal period he was not in possession of the specific, relevant facts which the local board was required by the Regulations to supply to him prior to the reclassification.

It is apparent that the principles applied in Donato and Wills are inapplicable to the present case. Title 32, Code of Federal Regulations, Section 1624.1(a) provides:

> "Every registrant, after his classification is determined by the local board except a classification which is itself determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended."
> [Emphasis added].

This appellate procedure is explained on the classification notice and can be further elucidated by local-board personnel.

The record in this case discloses that Lockhart was a high

school graduate who had attended college [p. 7]. [1/] He was notified twice by the local board of his I-A classification (SSS Form No. 110) and, also in writing and at the same time, that he had the right to appeal the board's decision provided he took his appeal within a specified time [pp. 3, 11]. Lockhart made no effort to appeal this classification. There is no evidence that Lockhart was unfamiliar with this procedure or was incapable of understanding it. On the contrary, the fact that he requested a Special Form for Conscientious Objectors (SSS 150) on March 9, 1965, and filed same on March 10, 1965 indicates his awareness of Selective Service procedures [pp. 12, 13-16]. Yet, after being classified I-A twice, he failed to appeal and was ordered to report for induction [pp. 11, 19]. By this time he had waived his administrative remedies.

There is no evidence in the record from which this Court could conclude that Lockhart's right to appeal was interfered with or that he was not advised and did not know of the consequence of his failure to appeal. Clearly the facts of this case do not present exceptional circumstances whereby a relaxation of the rule would be just and proper.

The urgent necessity of the granting of a rehearing en banc in the instant appeal is indicated by Judge Ely in his dissenting opinion wherein he stated: "It is to be hoped that the majority opinion in the present case will maintain only the briefest survival, for if not, the district courts will be overwhelmed with litigation involving

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1/ Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

problems whose solution should initially and properly fall within the responsibility of the agency created for the purpose. Moreover, the majority opinion opens, quite widely, a door leading to impairment of the nation's highest interest, the security of its people." [P. 18, Slip Opinion].

CONCLUSION

For the foregoing reasons, therefore, the Government respectfully urges this Court to reconsider its decision and adhere to the position which it has consistently adopted in the past.

Respectfully submitted,

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